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The U.S. Sentencing Guidelines: A Surprising Success?

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XII

**THE U.S. SENTENCING GUIDELINES: A
SURPRISING SUCCESS**

MICHAEL GOLDSMITH AND JAMES GIBSON

**THE U.S. SENTENCING GUIDELINES: A SURPRISING
SUCCESS**

by

Michael Goldsmith and James Gibson

Series Editor:
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New York University School of Law

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THE U.S. SENTENCING GUIDELINES: A SURPRISING SUCCESS

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I. INTRODUCTION

Before federal sentencing reform limited judicial discretion, defendants often trembled at the thought that "the law is what the judge had for breakfast." Certain culinary items suggested light sentences geared towards rehabilitation (eggs over easy, instant oatmeal, Sweet 'N Low, Lucky Charms, and Cheerios). However, others evoked harsher images of retribution, deterrence, and incapacitation (hard boiled eggs, bacon extra crisp, and especially Total, Life, or any type of toast). Of course, if the judge had dined on waffles or Fruit Loops (as often seemed to be the case), all bets were off.

Except for statutory caps, federal judges enjoyed wide latitude with virtually no appellate review. Under this open-ended system, trial judges could always finish the day content that justice had been served. Regardless of whether they had tempered justice with mercy or sent a tough-on-crime message, their judgment was always right—or at least not subject to meaningful appeal.¹

Congress, however, did not share this confidence. Judicial discretion had produced wide disparities in sentencing similarly situated offenders.² When more than 500 trial judges each applied his or her own sense of justice without any governing standard, unwarranted disparity inevitably occurred. For a nation grounded in equal justice, this situation proved intolerable. Congress responded by enacting the Sentencing Reform Act of 1984.³

The Act had two goals: (1) removing unwarranted disparities; and (2) producing "truth in sentencing" by eliminating parole,⁴ which had allowed

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many defendants to serve only one-third of their sentences.⁵ Under the Act, Congress established the United States Sentencing Commission and directed it to produce a sentencing system in which each crime carried a definite imprisonment range, subject to adjustment for specific offense characteristics and the offender's criminal history.⁶

The resulting U.S. Sentencing Guidelines⁷ recently marked their tenth anniversary, but many observers of the federal criminal justice system found little to celebrate about the continued existence of this revolutionary system. That it is revolutionary is not in doubt. Even Second Circuit Judge Jose Cabranes—one of the guidelines' most vocal critics—admits that the guidelines are one of this century's most significant developments in federal jurisprudence.⁸ The guidelines and the Sentencing Reform Act that created them did away with parole and moved to a model of determinate sentencing under which judges must follow the guidelines' detailed sentencing calculus.

What *is* in doubt is whether the guidelines represent an advance in our nation's approach to criminal law, or a step backward—a "dismal failure," as Judge Cabranes so bluntly asserted a few years ago.⁹ My goal is to convince you that the guidelines are in fact a surprising success, indeed that they represent a step forward in federal criminal justice.

This goal is no small task. Criticisms of the guidelines are not hard to find. When the guidelines were first introduced in the late eighties, the chorus of hisses and boos from the federal bench was deafening. Academics and practitioners were not kindly disposed either. Of the more than 600 articles written about the guidelines, only a handful have been favorable. Far more common are those whose titles contain terms such as "failure," "mess," "unacceptable," "death," "disease," and "flawed."¹⁰ Indeed, about the most neutral description I could find appeared in a few articles that merely referred to the guidelines as "controversial."¹¹

Not to be discouraged, I conducted a Westlaw search for articles whose titles combined the terms "guidelines" and "love." This, surprisingly enough, triggered one response: an article in the Wisconsin Law Review by former Commission staffer Frank Bowman, now a professor of law.¹²

Encouraged by this response, I then searched Westlaw for articles combining the terms "guidelines" and "cheer." This, too, produced a single response: "One Cheer for the Guidelines," by federal judge Stuart Dalzell.¹³ (I was unable to find any articles entitled "A Second Cheer for the Guidelines" or "How I Learned to Stop Worrying About Those Federal Sentencing Guidelines.") Given the dearth of favorable legal reviews, I am especially indebted to Professor Bowman and Judge Dalzell for helping me to defend a system that has been so widely attacked, and I rely heavily on their work for this presentation.

The guidelines' critics, however numerous, tend to identify only four overarching problems with the system. First, they say, the guidelines take the "human element" out of sentencing by prohibiting the use of certain factors that were key to judges' sentencing decisions in the pre-guidelines era.¹⁴ Second, the factors that are not prohibited are assigned a pre-determined weight, thus robbing judges of any meaningful discretion and transferring power to the prosecution.¹⁵ Third, the sentences that result from application of the guidelines are too long.¹⁶ And fourth, the guidelines are too complex.¹⁷

There is some merit to these criticisms. But none of them compels the conclusion that the guidelines system is a failure. At worst, they identify areas in which the Sentencing Commission and Congress can make improvements. By reviewing these criticisms one at a time, I hope to convince you that the current system is in fact working rather well, and that the future only looks brighter.

II. PROHIBITED FACTORS

First, the "prohibited factors" argument. Critics of the guidelines lament the absence of certain defendant characteristics from the guidelines' sentencing calculus: age, employment status, work history, education, family, community ties, et cetera.¹⁸ These were the very factors that judges used in the pre-guidelines era to "humanize" and individualize sentencing. For example, a judge might generally have had an idea of how a bank robber should be sentenced, but this general notion was fine-tuned by considering the personal factors that made the robber who he or she was. The guidelines, however, expressly categorize these same characteristics as "not ordinarily relevant."¹⁹ It's no wonder that the bench didn't like this new way of doing things.

Nevertheless, there are good reasons for restricting the use of these characteristics. Chief among them is their unpredictable effect. Professor Bowman posits the following example:²⁰ suppose we have two defendants, both convicted of fraud. One is a twenty-one year-old Mexican immigrant, raised by a grandparent after his drug-abusing mother abandoned him at age ten. A high school dropout with a history of gang involvement and a series of increasingly serious crimes on his juvenile record, he's before the court because he stole credit cards from the mail and ran up over \$9,000,000 in unauthorized charges.

The second defendant is a fifty-five year-old white male, married, with three children. He's a graduate of the NYU and has been a bank vice president for years, with a spotless employment record. A member of several civic and charitable associations, he coaches a youth soccer team and is a long-time vestryman at the local Episcopalian church. He's in trouble with the law for the first time, for having embezzled \$9,000,000 from his employer during the course of the last few years.

At sentencing, the Latino youth's lawyer would probably argue that the defendant's troubled upbringing, tender years, lack of guidance, and poor education mitigated the seriousness of his conduct. The prosecutor, however, would likely look at these same factors in light of the youth's prior record and argue that the defendant has not learned his lesson from past incidents, and thus poses a serious threat of recidivism.²¹

Meanwhile, in the courtroom next door, the attorney for the "pillar of the community" embezzler is pointing to a theretofore spotless life, adorned with various forms of service to the community, a loving and dependent family, and an unblemished reputation—the sully of which alone constitutes adequate punishment. The prosecutor also cites these factors, but asserts that this defendant is for those very same reasons especially *unsympathetic*. He had every advantage that society could bestow, and he threw it all away simply for greed.²²

Now, in the pre-guidelines era (Professor Bowman argues) the outcome of these two cases depended entirely on the "world view" of the sentencing judge.²³ If the judge thought that the young credit card thief had just never gotten a fair shake from society and deserved another chance, he could receive nothing more than a stern warning and routine visits with a probation officer. If the judge thought that this kid was beyond redemption, and that society's best hope was to keep him off the streets for as long as possible, then the statutory maximum sentence might be imposed.

Likewise, if the judge sees the banker as a productive, worthy, and respected member of the community who was guilty of no more than one aberrant error of judgment, probation could be the result. If the judge were instead to focus on greed, and betrayal of the system that had bestowed so much favor on the defendant, a long prison term might await the embezzler.²⁴

A tough call in both cases, especially since neither of these outcomes is necessarily "right" or "wrong."²⁵ Youth is usually an indicator for a high risk of recidivism,²⁶ but young defendants are also often seen as more deserving of a chance for rehabilitation. The white collar criminal may be deterred by sheer embarrassment and other forms of social disapprobation associated with conviction, thus lessening the need for incarceration,²⁷ but retributive principles argue for harsher treatment of those who had every advantage society had to offer but who nevertheless transgressed. In any event, the idea that *anyone* could consistently sort through these different goals and principles to produce the "right" sentence in each case is illusory.

Furthermore, there is another danger in relying too closely on factors such as age, employment, education, and family history. As Judge Dalzell has observed, those characteristics can easily correlate with factors that everyone agrees should *not* be considered, such as race, sex, national origin, and maybe

even religion.²⁸ One need only look at the recent controversy over the disparity between crack and powder cocaine sentences to realize that an ostensibly well-intentioned and race-neutral sentencing policy can produce problematic results.²⁹

Given these difficulties, the most reasonable approach for these personal defendant characteristics is to de-emphasize them and to focus instead on more objective criteria: the criminal conduct itself and the defendant's history of criminal convictions. And that's exactly what the federal guidelines do. All the calculations under the guidelines culminate in a sentencing table, in which the Y axis represents the seriousness of the defendant's offense and the X axis represents the defendant's criminal record.³⁰ Cross-referencing these two factors produces a sentencing range, the top of which may be no more than twenty-five percent higher than the bottom.³¹ The judge is then free to choose any sentence within that range.³²

This is an important point, because it shows that the guidelines do not completely bar consideration of these factors I have been discussing. The guidelines only say that these factors are not ordinarily relevant in determining which *range* applies to a given case. Once the range of potential prison terms has been determined, judges are free to apply whatever factors they see fit in choosing the final sentence. Professor Bowman calls it "a hierarchy of sentencing values—offense severity first, prior criminal history second, [and] personal characteristics third."³³ To me, this ranking represents an improvement over what came before; it's a happy compromise between the fear of a "dehumanized" sentencing process on the one hand and the danger of unacceptable sentencing disparity on the other.

III. JUDICIAL DISCRETION

Let me now address the second major criticism of the guideline system, namely that judges have been robbed of all meaningful discretion, not just with regard to the "prohibited factors" I have been discussing, but with regard to the whole process, from beginning to end.³⁴ Picture if you will a pre-guidelines sentencing proceeding. Swathed in ermine—or polyester, as the case may be—the judge looks down from the bench at the defendant and intones in an imposing, stentorian voice, "I have heard the evidence and have decided that you shall spend *X* years in the federal penitentiary." The *X* years, of course, was any prison term that fell between the statutory maximum and minimum for the offense of conviction. The judge had that much discretion, and was subject to essentially no appellate review.³⁵

Of course, the sentence imposed by the judge in the pre-guidelines era was rarely the sentence that the defendant was actually going to serve. It was the parole board that determined the ultimate release date. The focus under this

model was on rehabilitation; the idea was that the judge and the parole board could accurately determine when a defendant had endured enough punishment to emerge reformed. Penitentiaries existed to make their inmates penitent. Corrections facilities theoretically produced "corrected" citizens.³⁶

This idea fell out of vogue, however, as people gradually lost faith in the notion that a judge and a parole board could figure it all out. Rehabilitation was not an ignoble goal of punishment, but it was difficult to achieve on such a grand scale. We had quality jurists on the federal bench, but to demand such a degree of foresight from them was unrealistic. So Congress saw the Sentencing Reform Act as a way to move to a more realistic system, one that would concentrate more on the other traditional goals of sentencing: retribution, deterrence, and incapacitation.³⁷

Consequently, under the sentencing guidelines, the parole board is out of the picture entirely, and the judge has absolute control only over where to sentence the defendant within the twenty-five percent parameters of the applicable guideline range. Judicial discretion is clearly not what it used to be. The question is whether this is a bad thing.

Many judges think so. This should not come as a surprise.³⁸ The Sentencing Reform Act divested the bench of a power that not only was essentially unchecked, but that had also been an exclusively judicial function for hundreds of years. Judges were used to making sentencing decisions, and they not unreasonably thought that they had a handle on this aspect of their jobs. It might be hard to find a judge from the pre-guidelines era who didn't think that he or she had the wisdom to decide what punishment a given defendant deserved.

And maybe—if you take a charitable view of the federal bench—you might believe that each and every pre-guidelines judge had a coherent, rational, internally consistent sentencing philosophy, so that a defendant who appeared before the judge one week could be reasonably assured of being sentenced under the same criteria as the defendant who had been there the week before. Maybe sentencing wasn't about what the judge had had for breakfast. So one can readily understand why judges might resent being stripped of this authority.

But the concern behind the Sentencing Reform Act was not that an individual judge needed sentencing guidelines to keep him or her from sentencing two similar defendants in vastly different ways. The problem was that a judge would sentence differently *from the judge next door*.³⁹ In one infamous study⁴⁰ that sparked the sentencing reform movement, fifty district judges from the Second Circuit were given presentence reports from twenty actual cases, involving a representative range of offenses, and were asked what sentence they would impose in each. The results were remarkable and disturbing. Now, one might expect that the most severe sentence would differ

greatly from the least severe sentence, and that in fact occurred.⁴¹ But even toward the middle of the pack, the disparities were overwhelming: for many cases, the twelfth most severe sentence produced a prison term that was two or even three times the length of the twelfth least severe sentence.⁴² In only four of the twenty cases did the judges agree on whether the defendant should serve any time.⁴³ With no hint of overstatement, the report concluded that "absence of consensus is the norm."⁴⁴

Of course, no study can conclusively prove that such monstrous disparities are commonplace. But Professor Bowman's examples of the Latino credit card crook and the embezzling Anglo-Saxon banker illustrate how federal judges can reasonably disagree significantly about what a given defendant's punishment should be. And these examples, incidentally, only focused on the defendants' backgrounds; they didn't even touch on the notion that different judges would likely have different opinions regarding how much punishment the criminal conduct itself merited. To use another example, one judge might think that marijuana possession is no more than a self-destructive vice deserving of little governmental sanction. But the judge in the next courtroom might see any involvement with narcotics as a significant, blameworthy link in the chain of illegal drug networks that are a scourge of modern society. And although neither of these views is uncommon or unreasonable, they would probably lead to vastly different sentencing outcomes.

Quite clearly, it perverts justice to have two defendants who committed the same crime and who share the same background sentenced under different criteria, with correspondingly different results, merely because they end up before different judges. Reducing this kind of disparity was, of course, one of the central tenets of the sentencing reform effort that culminated in the enactment of the guidelines. If you don't agree that this inter-judge disparity is cause for concern, then there's no hope of converting you to my cause, and you should feel free to get up and head to the bar.

Excellent. A room full of potential converts. Every law professor's dream. Still, the mere fact that sentencing disparity is a legitimate concern does not tell us what we should do about it. It certainly doesn't mean that judges should have no say in a defendant's sentence; even the most fanatic convert to the disparity avoidance theory must realize that judges have an important role to play in the punishment process.

So let me suggest that the sentencing guidelines offer a happy medium: the guidelines prescribe a range of punishment, and the judge can choose any sentence in that range. As I said before, this means that the judge basically determines the last twenty-five percent of the sentence. To those who complain about this limitation on judicial discretion, I paraphrase Professor Bowman and ask why a judge's personal, unreviewable, unpredictable, and essentially secret

views should ever control *more* than twenty-five percent of a defendant's fate.⁴⁵

Moreover, in many instances the court still retains control over important aspects of the defendant's sentence. The court has considerable discretion in setting the appropriate fine.⁴⁶ In the lower ranges of the sentencing table, the court may decide whether to forego imprisonment in favor of probation, home detention, community confinement, or some combination thereof.⁴⁷ Setting the terms and conditions of probation and supervised release is still very much in the bailiwick of the sentencing judge.⁴⁸

And, of course, the guidelines provide an escape hatch for the judge who has good reason to believe that the prescribed sentencing range has failed to account for the unique aspects of a particular case. If there is some "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the guidelines, the judge may "depart," that is to say, choose a more appropriate sentencing range.⁴⁹ Although such a decision is subject to review, the Supreme Court's 1996 *Koon* decision⁵⁰ affirmed the sentencing judge's unique position to make such a determination: "A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court."⁵¹

"Fine," you may say. "Let's pretend you've convinced me that the limitations on judicial discretion aren't completely ill-founded. But the Sentencing Reform Act didn't just take discretion away from judges and give it to the Sentencing Commission; it gave it to *prosecutors*." This is a common criticism of the guidelines,⁵² and it is not without some justification. Under the guidelines, prosecutors do have more influence over sentencing—relative to judges at least. But on close examination, it appears that the prosecutor really only has significant control over three aspects of the sentencing process. Let's examine them in turn.

First, the prosecutor can decide not to bring certain charges, or to dismiss charges that have already been brought. This point is not really a criticism of the guideline system, however, because the prosecutors have always had this power (and have always used it to control the plea-bargaining and sentencing process).⁵³ Furthermore, the guidelines anticipate charge-based disparities and have a built-in response to this problem. That built-in defense is called "modified real-offense sentencing," which essentially means that the guidelines look beyond the count of conviction to what the defendant *actually did*.⁵⁴ So if a prosecutor pleads a drug dealer down to a "sale of paraphernalia" charge, the guidelines will still treat that defendant as a drug dealer—subject of course to the statutory maximum sentence for the paraphernalia charge and contingent on proof at the sentencing hearing that the defendant was actually dealing drugs.⁵⁵ Accordingly, the prosecutor's ability to influence sentencing by

manipulating charges can hardly be said to have increased under the guidelines; the opposite may in fact be true, since the guidelines for the first time require the court to consider what the defendant actually did even, in dismissed or uncharged conduct.

The second way in which the prosecutor influences sentencing is in his or her role as what Professor Bowman calls "master of the facts."⁵⁶ What this means is that the prosecutor, by choosing not to reveal certain evidence to the court, can influence the factual findings that go into making sentencing determinations. Now, historically the prosecutor has always had a lot of control over what facts were presented to the court, but this control takes on increased importance under the guidelines, where the relationship between the facts of a case and the sentencing outcome is more direct and predictable than it was in the pre-guidelines era. But there are significant limitations on this power as well.

First, the judge is no naive outsider. Having sat through the defendant's trial, the court already knows a lot about the facts of the case. And at sentencing the judge is the one who decides what evidence is credible and what evidence isn't.⁵⁷ Second, there's the probation officer who prepares the presentence report. This is done in cooperation with the prosecution, but probation officers can and do provide an important perspective that helps judges decide whether they've got the full picture.⁵⁸ Third, the defendant and his or her attorney are not going to sit idly by and let the prosecutor run the show; we can count on them to present evidence of any mitigating circumstances. Finally, as an attorney and representative of the people the prosecutor is subject to considerable ethical constraints when it comes to concealing relevant evidence.⁵⁹

So when all is said and done, the prosecutor's control of the facts falls well short of being a reliable way of circumventing the correct outcome under the guidelines. There is one area, however, in which the prosecutor's power may have too few limits, and that is in seeking departures for "substantial assistance." Under the guidelines, if a defendant aids authorities in the investigation or prosecution of another offense, he or she may be entitled to a lower sentence—but only if the prosecution makes a motion to that effect.⁶⁰ The defense may not request such a departure, nor can the court grant one *sua sponte*.⁶¹

The government, of course, is in the best position to determine whether the defendant has really cooperated, but the statistics on the use of this prerogative cast doubt on whether it is really doing what it's supposed to do. In the late 1980s, substantial assistance departures were used in less than eight percent of all cases.⁶² That number has steadily grown; last year almost one in five defendants received a departure for substantial assistance.⁶³ Obviously, this progression is not due to some gradual realization by prosecutors that defendants might know something about other crimes. Rather, prosecutors

appreciate that their power to move for a substantial assistance departure is a useful bargaining chip in the plea negotiation process. And courts have acquiesced in this scheme by granting the motions—especially since judges often have even less desire than the prosecution to see these cases go to trial. In the Eastern District of Pennsylvania in recent years, almost fifty percent of defendants have received this bonus.⁶⁴ Perhaps Philadelphia is a city of exceptionally well informed rats, but at the very least its substantial assistance rate gives new meaning to the term “brotherly love.”

I would guess that relatively few of these cases involve much in the way of useful information from the defendant; the prosecution is just cutting the defense a sweet deal to get a conviction without going before a jury. And the deal can indeed be sweet. Some of you may have heard of the case of Alan Eagleson, an National Hockey League Hall of Famer who recently pleaded guilty to three counts of mail fraud related to his shady dealings as a sports agent and union head.⁶⁵ He had been accused of stealing millions and was indicted on thirty-six counts of labor fraud, racketeering, embezzlement, obstruction of justice, and so on.⁶⁶ His three counts of conviction would have resulted in a guideline sentence of approximately four years,⁶⁷ but the prosecution gave him a substantial assistance departure and he got only probation.⁶⁸

Now Mr. Eagleson's case may have been special—it involved Canadian charges as well⁶⁹—and he may well have helped the prosecution a great deal. I use this example merely to point out how great these sentence reductions can be, and therefore how tempting it is for prosecutors to use them when they want a concession from the defense. This is sometimes a regrettable aspect of the sentencing guidelines system, and I believe it is the source of many of the criticisms directed at prosecutorial power under the Sentencing Reform Act. But I do find it interesting that the prosecution's ability to seek substantial assistance departures, like its ability to conceal aggravating facts from the court, has only a *lowering* effect on sentences.⁷⁰

So all this hubbub about increased prosecutorial power is really about power that is only useful to *lower* sentences from what they would otherwise be. If the Commission could figure out a way to limit this prosecutorial discretion, then, the result would probably be *higher sentences*. Is this what the critics of the guidelines want? I am sure it's not.⁷¹ In fact, the third major criticism of the guidelines, to which I will now turn, is that they produce overly severe sentences. If this is true, then maybe my cynicism regarding the sentence-lowering machinations in which prosecutors engage is misplaced. Maybe they're not simply trying to avoid a trial; maybe they're trying to reach a more equitable result. And maybe the complaints about loss of judicial discretion would not be so shrill if the sentences that the guidelines produced were not as

high.

IV. SENTENCE LENGTH

So are sentences too long under the guidelines? Yes and no. Or maybe I should put it this way: no, except in one area—drugs. Many drug sentences are admittedly too high, but these sentences usually reflect what Congress has done independently of the Commission. I refer, of course, to the mandatory minimum penalties for drug trafficking.

Mandatory minimum penalties represent exactly what the guidelines are *not* all about. They focus on just one isolated aspect of the defendant's conduct, to the exclusion of all other considerations. In the drug statutes, that one factor is the quantity of drugs involved in the offense.⁷² A guidelines system, on the other hand, is designed to weigh the good against the bad, and not let any one aspect of the case overwhelm all other relevant sentencing considerations.

And to the Commission's credit, it has consistently opposed the use of mandatory minimums in general and unduly harsh drug statutes in particular. In 1991 the Commission submitted a report to Congress that roundly criticized the concept of mandatory minimums.⁷³ And in 1995 the Commission unanimously criticized the infamous 100:1 crack-to-powder quantity ratio under which dealing ten grams of crack cocaine is punished the same as dealing a kilo of powder cocaine.⁷⁴ Unfortunately, Congress didn't take the Commission up on either initiative.⁷⁵

Indeed, if we didn't have the guidelines, judges would probably be dealing with more of these mandatory minimum statutes; if Congress is willing to enact such provisions in the face of the federal guideline system we already have in place, imagine what Congress might do absent such a system. The temptation to fill that vacuum with even more statutory sentencing enhancements would probably be overwhelming. Opponents of the guidelines should be careful of what they ask for—they might get it. And a whole lot more.⁷⁶

As for non-drug sentences, there are good reasons for their severity. The original Commissioners drafted the guidelines in the late 1980s with a certain view as to the role of federal law enforcement. We've all heard the phrase, "Don't make a federal case out of it."⁷⁷ It implies, of course, that federal jurisdiction over criminal matters should be reserved for crimes more serious than your run-of-the-mill case. So if a bank fraud is serious enough to warrant attention from the feds, then it probably deserves more punishment than the guy on the corner who tries to sell you a fake Rolex watch (spelled with two "L"s). Federal sentences should be tough because the feds aren't—or at least shouldn't be—wasting their time with small fry.⁷⁸

Further, once we set aside the Congressionally mandated drug sentences (drugs, by the way, account for about forty percent of all federal cases⁷⁹), the guidelines' punishment levels just aren't that high. In fact, drugs aside, the Commission most often hears complaints from the public about sentences being too *low*. This is especially true for white collar offenses and crimes of violence. In my view, then, the source of the general discontent about sentence length is the same as the source of the discontent about limited judicial discretion: some drug sentences are too high. This is unfortunately sometimes true, but it has little to do with the Sentencing Reform Act, the Sentencing Guidelines, or the Sentencing Commission.

V. COMPLEXITY

Now to the last major criticism of the guidelines: they're too hard to understand.⁸⁰ Before I get into this one, I want to reinforce one basic understanding. We're talking about a system of guidelines that replaced *a vacuum*. That is to say, there was nothing governing sentencing decisions in the pre-guidelines era except for the general, toothless limitation that the sentence could not be illegal, which basically meant that the judge had to choose a sentence within the statutory minimum and maximum.⁸¹

So the movement to a sentencing guidelines system was clearly going to result in relatively increased complexity. This may seem obvious, but a 1996 Washington Post series critical of the guidelines began by asserting that "[a] system meant to simplify the punishments meted out for particular crimes has made them more complicated . . ."⁸² It continued, "A system meant to streamline the sentencing process instead has clogged the courts with appeals . . ."⁸³ Now, I don't know where the Post was getting its information, but anyone who thinks that going from a system of unlimited discretion and no accountability to a structured, uniform framework of universally applicable legal rules will simplify or streamline anything is just not the swiftest pony in the corral. I mean, you can't get any simpler or more streamlined than the pre-guidelines system. That was the whole problem.

So the question is—assuming for the moment that the idea of a sentencing guidelines system is an acceptable one—is what we have too complicated? Well, what do we have? We have a book, a guidelines manual. Nice friendly format, big fonts. Lots of white space. Look here, these two pages are almost completely devoid of text!⁸⁴ And this one is completely blank!⁸⁵ Try finding *that* in a bankruptcy manual or the internal revenue code.

Anyway, the substantive portion of the manual is about four hundred pages long. (The rest is composed of appendices and other reference material that make the substantive portion easier to understand, rather than more complicated.) Frankly, that ain't bad, considering that we have over nine

hundred different federal offenses to cover.⁸⁶ The federal criminal code, which to an extent dictates the degree of complexity of the guidelines, is hardly a model of clarity. And, of course, only a small fraction of the manual's pages are consulted in a given case. If you don't violate the terms of your probation or supervised release, you're never going to see Chapter Seven. If you're not an organization, Chapter Eight is out. I'm amazed at how slim this thing is, come to think of it.

I'm kidding, of course, but so many critics of the guidelines point to the length of the manual and then instantly conclude, without any further evidence, that the system is just way too complicated. As anyone who has practiced under the guidelines will acknowledge, however, it's nothing like ERISA or any of the other more arcane areas of the law. It's just not that hard. The complaints from practitioners about the complexity of the guidelines are really just the griping of those who preferred the old system, where sentencing was a crap-shoot and there were no standards to speak of.⁸⁷

And I should point out that the Commission has an extensive training staff that flies all over the country helping judges, probation officers, and attorneys learn how to deal with the guidelines. The same staff also maintains a help line that anyone can call with questions about guideline application. And, from what I understand, the Commission staff has a much better record than those folks who answer questions over at the IRS.

We must also recognize that the Sentencing Reform Act demands a certain level of complexity from the guidelines. As I mentioned before, all the guideline calculations eventually lead you to the sentencing table, on which the Y axis represents the seriousness of the defendant's offense and the X axis represents the defendant's criminal record.⁸⁸ The Y axis has forty-three different levels, and the X axis has six.⁸⁹ That's two hundred and fifty-eight different cells containing sentencing ranges. It certainly looks pretty complex, especially if you've seen some state sentencing guideline tables. (Minnesota's table, for instance, only has seventy cells.⁹⁰)

But the Sentencing Reform Act put two restrictions on the Commission that made a table of this complexity pretty much unavoidable. First, as I mentioned before, the top of each sentencing range can be no more than twenty-five percent greater than the bottom.⁹¹ So if the bottom of a range is, say, forty months, the top of the range can't be more than fifty months. A range that starts at one hundred months can't end higher than one hundred twenty-five months. You get the idea. (See? This stuff isn't that tough.)

Second, the Sentencing Reform Act required that the table top out at about thirty years, because that was the point at which the Act allowed the Commission to authorize a life sentence.⁹² So it was the combination of these two factors (plus some minor, reasonable policy decisions by the original

Commission⁹³) that led to such a detailed table: the Commission *had* to use fairly small ranges, and it had to use them all the way up to the thirty-year mark.

That meant a lot of cells. And, of course, once the Commission had all those cells, it had to come up with some way to distinguish them from one another. You can't have two hundred and fifty-eight cells and just one or two factors to consider per case.

All this technical stuff aside, there's one aspect of the complexity criticism that I have yet to address, and it's the most worrisome aspect. Lawyers may be able to understand the guidelines without too much trouble, but can defendants understand what's happening to them? Calculating which of the two hundred and fifty-eight cells a defendant falls into involves some number-crunching, and there is a danger that defendants could get overwhelmed by all the math and lose the sense that there's any underlying justice in the process.⁹⁴

On the other hand, I do think that in most cases a defense attorney can usually sit down with his or her client and explain the process in plain English in half an hour or less. The typical presentence report section that contains the sentencing calculations is usually just a few pages, and it's not that hard to understand. "Well, Jack, take a look at this guideline: You robbed a bank, so you start with twenty-two points.⁹⁵ You had a gun on you, so that's another five.⁹⁶ You took off with \$100,000 and a bank guard in tow; that's another six.⁹⁷ But you've accepted responsibility for what you did, and you cooperated somewhat with authorities after you were caught, so that's three points off.⁹⁸ That gives you a total Offense Level of 30. Your two prior thefts and one assault put you in Criminal History category III.⁹⁹ So, on this table you can see that an Offense Level of 30 and Criminal History category III mean that you'll get between 121 and 151 months."¹⁰⁰

Now, that's not that bad, is it? You may think it sounds too clinical, but it's certainly not nearly as inscrutable as critics make it out to be. Of course, I'd like to do even better than that; I would like to see the guidelines simplified to a point at which defendants could understand them just by picking up the manual and paging through it.¹⁰¹ In fact, I've been a major proponent of the Commission's simplification project.

But there's no easy way to get from here to there, and so I console myself once again by comparing the present state of things with what came before. In the pre-guidelines era, a bank robbery defendant, who used a gun, would appear for sentencing knowing only that he or she could get anywhere from probation to 25 years.¹⁰² At best, the court would recite a litany of criteria that it had considered in setting the punishment and would then announce the result, the final sentence. The defendant might even think that this wasn't a bad method, that the judge had mentioned some reasonable stuff—until the defendant met a fellow inmate who had committed exactly the same crime and

was only serving half the time.

At worst, a pre-guidelines sentencing would not even seem to follow any logical sentencing calculus. As Professor Bowman says, "If there is one spectacle less illuminating [to a defendant] than the intricacies of a guidelines argument, it is that of a judge in an indeterminate sentencing system sitting in sphinx-like silence through a sentencing and then proclaiming, 'In consideration of all the factors presented before me today, I sentence you to [25 years]. Thank you. We will be in recess.'"¹⁰³ In such a case, the defendant might not wonder what all the math was about, but would nevertheless probably lose faith in the system right there in the courtroom.

So when I lament the complexity and potential for confusion that sometimes mar the guidelines system, I stop and think about what result I would prefer: a defendant bowled over by numbers, who needs a lawyer to explain what it's all about, or a defendant who, upon hearing the sentence, turns to his lawyer and asks why he got so much time, only to be met with a blank stare, a shrug, and a "I dunno. Judge musta had indigestion this morning." I'll take the math anytime.

And finally, even if the defendant's eyes glaze over throughout the whole process, and he or she never really understands what happened, I am somewhat comforted by the idea that *at least there was a process at work*.¹⁰⁴ When the state deprives someone of liberty, the need for a regimented, procedurally sound, reviewable process is at its highest.¹⁰⁵ Maybe there were times when pre-guideline sentencing *seemed* more comprehensible to defendants, but hidden behind the judge's explanation was at best a rationale that could be totally different from that of the judge next door, and at worst subconscious, insidious inconsistencies and biases.

VI. VISIBILITY

This brings me to my final point. It's not a response to any of the four criticisms I have been discussing. Rather, it's a unique and important advantage of the guidelines system, one that I think would convince even the guidelines' most rabid critic that at least something good has come of the Sentencing Reform Act. And that is that the system is *visible*. The pre-guidelines sentencing system—to the extent that there was anything that could properly be called a system—was entirely *invisible*. No one knew what was going into a given sentencing decision.

But now we have a wealth of information about sentencing practices, and we have opened vast new areas of criminal justice to empirical analysis. In a big room at the Sentencing Commission, there are dozens of data extractors who do nothing all day except sit there and code every case that is decided under the guidelines. That means that for each of the almost 50,000 sentencings

that occur in the federal courts each year,¹⁰⁶ the Commission collects a pool of variables that explain how the sentence came to be. This database is publicly available to anyone who wants to use it, and many people do.¹⁰⁷

So it's no wonder that there are so many criticisms of the guidelines: there's so much to see. And whenever a valid criticism is made, I find consolation by thinking, "Hey, at least we can *see* the problem. We don't have to speculate."

And, of course, once we have identified a problem, a corollary advantage of the system comes to light: we can fix it in the traditional, public, democratic fashion. The process is now quasi-legislative. For instance, the crack/powder sentencing problem is something that everyone can see, thanks to the now-visible nature of sentencing and to the data collection efforts of the Commission. And once a problem like that has been documented, solving it becomes a matter of the political process and political will.¹⁰⁸ Now, I'd be the first to admit that the political process may not be the most rational system in the world. But compare it to the state of things in the pre-guidelines era, where racial disparity in a single judge's sentencing practices—or in the system overall—was very difficult to track in any comprehensive, meaningful way and would have been impossible to correct.

VII. CONCLUSION

Accordingly, despite the danger that our mathematically challenged legal profession might screw up the numbers, I'm glad that we have federal sentencing guidelines. They appropriately cabin judicial discretion without destroying it. They trade simplicity for consistency, and come out ahead. And the problems that do exist, such as some overly harsh drug sentences, can be identified and remedied much more readily than was the case in the pre-guidelines era.

I am not alone in my affection. Although the guideline system could hardly have been called popular when it was first instituted, things have changed somewhat over the ten years that it's been in place. Back then, over two hundred district judges invalidated the guidelines and all or part of the Sentencing Reform Act¹⁰⁹—until the Supreme Court upheld the whole kit and caboodle in the 1989 *Mistretta* case.¹¹⁰ But more and more we see judges and practitioners whose only sentencing experiences have been under the guidelines, and who are more accepting of the system.

In fact, the Federal Judicial Center recently surveyed all federal district judges¹¹¹ and asked them, among other things, what they thought about the fairness of the major guidelines areas, like drugs, fraud, immigration, et cetera. The responses were done on a scale of one to five, where one was too lenient, five was too harsh, and three was just right. All twelve areas surveyed clustered

around the "just right" mark with the average score for all the areas combined being 3.03.¹¹² So judges may have problems with the guidelines system, but its overall fairness is apparently not among them.

Finally, I think the guidelines embody an important concept, one mentioned in Judge Dalzell's article: that ours is "a government of laws, not men."¹¹³ There is no more momentous an interaction of the state and the individual than when the matter of that individual's liberty is being decided. At that point, then, it is not only appropriate but essential that the standards at play are consistent, just, and amenable to the democratic process. However imperfectly, the sentencing guidelines look to that ideal, and they do so more faithfully than the system that came before.

For these reasons, Judge Dalzell has wisely concluded that Churchill's adage about democracy probably applies with equal vigor to the federal guideline system: It is the worst possible way to sentence a defendant, except for all the others.¹¹⁴

¹Prior to the Sentencing Reform Act, the severity of a federal sentence was unreviewable, as long as the sentence fell within the minimum and maximum terms set forth in the criminal code. See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (“[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.”).

²See, e.g., Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY* (1974).

³Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 1984 U.S.C.C.A.N. (98 Stat.) 1987 (1984).

⁴See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988); see also Sentencing Reform Act, § 212(a)(2), 1984 U.S.C.C.A.N. (98 Stat.) at 1990 (directing the sentencing court to consider “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct”) (codified at 18 U.S.C. § 3553(a)(6) (1998)); S. REP. NO. 98-225, at 52 (1983) (“A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.”), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235; *id.* at 56 (“Under the [Sentencing Reform Act], the sentence imposed by the judge will be the sentence actually served. . . . The prisoner, the public, and the corrections officials will be certain at all times how long the prison term will be . . .”), *reprinted in* 1984 U.S.C.C.A.N. at 3239.

⁵For example, in fiscal year 1986, before the federal sentencing guidelines went into effect, the Federal Bureau of Prisons released 4,657 prisoners on parole. The average parolee had served just 34.9% of his or her original sentence. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, *STATISTICAL REPORT FISCAL YEAR 1986* tab. C-2 (1986).

⁶See Sentencing Reform Act, § 217(a), 1984 U.S.C.C.A.N. (98 Stat.) at 2017-26 (creating the U.S. Sentencing Commission); *id.*, 1984 U.S.C.C.A.N. (98 Stat.) at 2020 (directing the Commission to consider, *inter alia*, “the circumstances under which the offense was committed,” “the nature and degree of harm caused

by the offense," and the defendant's "criminal history") (codified at 18 U.S.C. § 994(c)(2)-(3), (d)(10)).

⁷See U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (1998) [hereinafter U.S.S.G.].

⁸Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., FEB. 11, 1992, at 2; see also Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680 (agreeing with Judge Cabranes that "[o]ne can hardly overstate the significance of the Guidelines").

⁹See Cabranes, *supra* note 8, at 2.

¹⁰See Albert A. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec. 1991, at 45; Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 CRIME & DELINQ. 131 (1993); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899 (1992); David Yellen, *Just Deserts and Lientent Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434 (1997).

¹¹See, e.g., Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y. L. SCH. J. HUM. RTS. 835, 850 (1993) ("the controversial Federal Sentencing Guidelines"); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1117 (1995) ("[T]he Sentencing Guidelines continue to be the most controversial area of federal criminal law."); Gregory W. O'Reilly & Robert Drizin, *United States v. Lopez: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 1, 8 (1996) ("controversial experiments like the federal sentencing guidelines"); Stephanie C. Slatkin, Note, *The Standard of Proof at Sentencing Hearings Under the Federal Sentencing Guidelines: Why the Preponderance of the Evidence Standard Is*

Constitutionally Inadequate, 1997 U. ILL. L. REV. 583 ("the complex and controversial federal sentencing guidelines").

¹²Bowman, *supra* note 8.

¹³Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317 (1995).

¹⁴See, e.g., Clarke, *supra* note 10, at 45; Freed, *supra* note 10, at 1715-18; Ogletree, *supra* note 10, at 1954-55; Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 3 (1987). Cf. Bowman, *supra* note 8, at 704 ("The first and most commonly heard complaint about the Guidelines is that they are mechanistic, soulless, and inhuman.").

¹⁵See, e.g., Alschuler, *supra* note 10, at 926; Freed, *supra* note 10, at 1697; Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 190-200 (1991).

¹⁶See, e.g., Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 772-72 (1992); Stephan J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 854 (1992); Weinstein, *supra* note 14, at 3.

¹⁷See, e.g., Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 287, 290 (1993); Uelman, *supra* note 10, at 902; Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA. L. REV. 83, 99 (1988).

¹⁸See sources cited *supra* note 14.

¹⁹See U.S.S.G. §§ 5H1.1-6, .11-12.

²⁰Bowman, *supra* note 8, at 707-08.

²¹*Id.* at 707.

²²*Id.* at 707-08.

²³*Id.* at 708.

²⁴*Cf.* S. REP. NO. 98-225, at 41 (1983) ("One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him."), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224.

²⁵*See* Bowman, *supra* note 8, at 708 ("The real problem is that all of the arguments I have placed in the mouths of the defenders and prosecutors of my hypothetical defendants are 'true.'"), 710 ("Indeed, the flaw lies in the very notion of a 'right sentence.'").

²⁶*See, e.g.,* Peter B. Hoffman & James L. Beck, *Burnout: Age at Release from Prison and Recidivism*, 12 J. CRIM. JUST. 617 (1984); David A. Pritchard, *Stable Predictors of Recidivism: A Summary*, 17 CRIMINOLOGY 15 (1979).

²⁷*See* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY 587 (1995) (finding that imprisonment does not have a specific deterrent impact on likelihood of white-collar criminal recidivism); Kenneth Mann et al., *Sentencing the White Collar Offender*, 17 AM. CRIM. L. REV. 479, 483-86 (1980) (discussing judges' views on disapprobation); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 416-17 & n.24-25 (1980) (discussing social stigma associated with conviction).

²⁸*See* Dalzell, *supra* note 13, at 332.

²⁹*See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

³⁰*See* U.S.S.G. ch. 5, pt. A (sentencing table).

³¹There are two exceptions to this "Twenty-Five Percent Rule": each range can span a minimum of six months, and a range with a minimum of thirty years or more may have a maximum of life imprisonment. *See* 28 U.S.C. § 994(b)(2) ("If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months,

except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.”).

³²If the range spans more than twenty-four months, the judge must state his or her reasons for choosing the particular point in the range. See 18 U.S.C. § 3553(c)(1).

³³Bowman, *supra* note 8, at 714; see generally *id.* at 712-13.

³⁴See sources cited *supra* note 15.

³⁵See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (“[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.”).

³⁶Or, as Professor Bowman states, “Penitentiaries would inspire penance and reformatories would reform.” Bowman, *supra* note 8, at 685.

³⁷Even under the Sentencing Reform Act, rehabilitation remains one of the purposes of sentencing. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 1984 U.S.C.C.A.N. (98 Stat.) 1987, 1989 (1984) (codified at 18 U.S.C. § 3553(a)(2)(D)); see also S. REP. NO. 98-225, at 76 (1983) (“The committee does not suggest that efforts to rehabilitate prisoners should be abandoned.”), reprinted in 1984 U.S.C.C.A.N. 3182, 3259. But Congress clearly sought to remove rehabilitation from its lofty status and focus on the other purposes. See *id.* at 38 (“In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . [I]t is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”), reprinted in 1984 U.S.C.C.A.N. at 3221; *id.* at 40 (“Recent studies suggest that [rehabilitation] has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.”) (footnotes omitted), reprinted in 1984 U.S.C.C.A.N. at 3223; Sentencing Reform Act, § 212(a)(2), 1984 U.S.C.C.A.N. (98 Stat.) at 1998 (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term,

shall . . . recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.”) (codified at 18 U.S.C. § 3582(a)); *id.* § 217(a), 1984 U.S.C.C.A.N. (98 Stat.) at 2022 (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . .”) (codified at 28 U.S.C. § 994(k)); *id.* § 217(a), 1984 U.S.C.C.A.N. (98 Stat.) at 2023 (“Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason [for sentence reduction].”) (codified at 28 U.S.C. § 994(s)).

³⁸See Bowman, *supra* note 8, at 725 (noting that limitation of judicial discretion was the Sentencing Reform Act’s principal purpose).

³⁹See *id.* at 686-87.

⁴⁰PARTRIDGE & ELDRIDGE, *supra* note 2.

⁴¹*Id.* tab. 1.

⁴²*Id.* at 9 & tab. 1.

⁴³*Id.* at 10.

⁴⁴*Id.*

⁴⁵Professor Bowman puts it this way: “The question Judge Cabranes and other guideline critics must answer is why the idiosyncratic judgments of a randomly selected judicial officer should ever control more than 25% of the sentence of any criminal defendant.” Bowman, *supra* note 8, at 713.

⁴⁶See U.S.S.G. § 5B1.2.

⁴⁷See *id.* §§ 5B1.1-.2, 5C1.1, 5F1.1-.3.

⁴⁸See *id.* §§ 5B1.3, 5D1.1-.3, 5F1.5.

⁴⁹See 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0.

⁵⁰Koon v. United States, 518 U.S. 81 (1996).

⁵¹*Id.* at 98; *see also* Bowman, *supra* note 8, at 718 (discussing departure authority as mitigating guidelines' limitation on judicial discretion).

⁵²*See, e.g.,* David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196 (1995); Freed, *supra* note 10, at 1723-24; Heaney, *supra* note 15, at 190-200. *But see* James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. L. REV. 1317 (1997).

⁵³*See* Stuart Nagel & Kathleen Levy, *The Average May Be the Optimum in Determinate Sentencing*, 42 U. PITT. L. REV. 583, 622-23 (1981) (discussing prosecution's pre-guidelines power in plea-bargaining and sentencing process); Louis B. Schwartz, *Options in Constructing A Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 684-686 (1981) (same); Paul M. Secunda, *Cleaning up the Chicken Coop of Sentencing Uniformity: Guiding The Discretion of Federal Prosecutors Through The Use of The Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1271 (1997) (same).

⁵⁴*See* U.S.S.G. ch 1, pt. A, at 5-6 (explaining how the Commission came to adopt this approach). The guidelines themselves no longer use the words "modified real-offense"; the term was deleted in 1990. *See* U.S.S.G. app. C, at 122, 126 (amendment 307). The term has nevertheless endured as a catchphrase for the guidelines' "relevant conduct" principle, embodied in U.S.S.G. § 1B1.3. *See, e.g.,* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997). For an explanation of this principle by Commission insiders, *see* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497-503 (1990). *Cf.* Bowman, *supra* note 8, at 703 ("[T]he essence of the [relevant conduct] concept is that the court can, indeed must, sentence each defendant based on what he really did as part of the same transaction or series of related transactions that resulted in the count of conviction, regardless of the specific offense of which a defendant is convicted after trial or as a result of a plea").

⁵⁵Our hypothetical drug dealer who pleads to a sale of paraphernalia charge under 21 U.S.C. § 863 would be sentenced under U.S.S.G. § 2D1.7. If the drug dealing fell within his or her "relevant conduct," as defined by § 1B1.3, then the cross-reference in § 2D1.7(b)(1) would apply and the defendant would be sentenced under § 2D1.1, just like any other drug dealer.

⁵⁶Bowman, *supra* note 8, at 726.

⁵⁷See *id.* at 718.

⁵⁸Professor Bowman characterizes the involvement of the probation officer as "possibly the greatest institutional constraint on unbridled manipulation of the facts by the parties [at sentencing]." *Id.* at 730.

⁵⁹See, e.g., U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS MANUAL § 9-27.400, .430, .710; Bowman, *supra* note 8, at 727-28.

⁶⁰See U.S.S.G. § 5K1.1.

⁶¹See *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (holding that court may review prosecutor's decision not to move for substantial assistance departure only if based on unconstitutional motive or not rationally related to any legitimate Government end).

⁶²For example, in 1989 the substantial assistance departure rate was 7.5%. U.S. SENTENCING COMMISSION, ANNUAL REPORT 1990 tab. C-5 (1990).

⁶³The substantial assistance departure rate in fiscal year 1997 was 19.2%. U.S. SENTENCING COMMISSION, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51 (1997).

⁶⁴In fiscal year 1996, 47.5% of all defendants in the Eastern District received a substantial assistance departure. U.S. SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (1996). The next year, the figure dropped to 41.8%. U.S. SENTENCING COMMISSION, *supra* note 63, app. B.

⁶⁵See *Ex-NHL Union Head Enters Guilty Plea in Mail-Fraud Case*, WALL ST. J., January 7, 1998, at B16.

⁶⁶See *The Fall of R. Alan Eagleson*, GLOBE & MAIL (Toronto), January 7, 1998, at S3.

⁶⁷The U.S. Attorney in the case thought that Eagleson could get anywhere from three to ten years. See Sean Fine et al., *The Bargain*, GLOBE & MAIL (Toronto), January 7, 1998, at A1. The judge calculated a guideline range of forty-one to

fifty-one months. *See Ex-Union Chief Eagleson Guilty of Mail Fraud*, ROCKY MOUNTAIN NEWS, January 7, 1998, at 9C.

⁶⁸*See Ex-NHL Union Head*, *supra* note 65, at B16.

⁶⁹Eagleson's plea agreement involved extradition from Canada and resolution of criminal charges there as well. *See Fine et al.*, *supra* note 67, at A1. Nevertheless, in the end he ended up serving only six months in Canadian prison. *See Eagleson Leaves Jail, Can't Avoid Spotlight*, GLOBE & MAIL (Toronto), July 8, 1998, at A3.

⁷⁰*See Bowman*, *supra* note 8, at 726.

⁷¹Professor Bowman warns guidelines critics to "be careful what you wish for because you might get it." *Id.* at 732.

⁷²*See, e.g.*, 21 U.S.C. § 841(b)(1).

⁷³U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 33-34 (1991).

⁷⁴U.S. SENTENCING COMMISSION, *supra* note 29, at 195-200.

⁷⁵*See* Act of Oct. 30, 1995, Pub. L. No. 104-38, 1995 U.S.C.C.A.N. (109 Stat.) 334 (disapproving of Commission effort to eliminate crack/powder disparity).

⁷⁶*See supra* note 71.

⁷⁷*Bowman*, *supra* note 8, at 739.

⁷⁸*See id.* at 739.

⁷⁹U.S. SENTENCING COMMISSION, *supra* note 63, fig. A, at 11.

⁸⁰*See* sources cited *supra* note 17.

⁸¹The only valid challenges to a sentence within the statutory range were based on a deficiency in the sentencing process. *See, e.g., United States v. Tucker*, 404 U.S. 443 (1972) (holding that sentencing judge's ignorance of unconstitutionality of two previous convictions warranted reconsideration of

sentence).

⁸²Mary Pat Flaherty and Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, WASH. POST, Oct. 6, 1996, at A1.

⁸³*Id.*

⁸⁴U.S.S.G. at 38-39.

⁸⁵*Id.* at 258.

⁸⁶The statutory index to the guidelines lists well over 900 separate offenses. See *id.* app. A. There are countless others that are not listed; the federal code contains some 3,600 provisions that carry criminal sanctions. See Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. LAW REV. 195, 198 (1997). Note, however, that infractions and Class B and C misdemeanors do not fall within the sentencing guidelines' coverage. See U.S.S.G. § 1B1.9.

⁸⁷Professor Bowman calls it "pro forma bellyaching." Bowman, *supra* note 8, at 705.

⁸⁸See U.S.S.G. ch. 5, pt. A (sentencing table).

⁸⁹*Id.*

⁹⁰MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 45 (1998).

⁹¹See 28 U.S.C. § 994(b)(2). There is actually a limitation of this "Twenty-Five Percent Rule" for the smaller sentencing ranges: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months" *Id.* (emphasis added). Note that the Committee on Criminal Law of the Judicial Conference of the United States is of the opinion that the Twenty-Five Percent Rule is not as confining as the Commission believes. See Catherine M. Goodwin, *Background of the AO Memorandum Opinion on the 25% Rule*, 8 FED. SENTENCING REP. 109 (1995); *Memorandum Opinion of the General Counsel's Office, Administrative Office of*

⁹²See 28 U.S.C. § 994(b)(2) ("If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, *except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.*") (emphasis added).

⁹³These included the decision to allow the coverage of adjacent guideline ranges to overlap, so that the high point of a given guideline range is the midpoint of the next range and the low point of the next after that. For example, in Criminal History Category I, an Offense Level of 16 produces a range of 21 to 27 months. Offense Level 18, two levels higher, has a range of 27 to 33 months. See U.S.S.G. ch. 5, pt. A (sentencing table). This overlap does increase the number of cells in the table, but in doing so it allows the court to defuse debates about one- or two-level sentencing factors by pointing out that it can impose the same sentence regardless of whether the factor is applied.

⁹⁴See Bowman, *supra* note 8, at 706.

⁹⁵See U.S.S.G. § 5B3.1(a), (b)(1).

⁹⁶See *id.* § 5B3.1(b)(2)(E).

⁹⁷See *id.* § 5B3.1(b)(4)(A), (b)(7)(C).

⁹⁸See *id.* § 3E1.1(a), (b).

⁹⁹Assuming that Jack served more than sixty days but less than a year for each of his three prior offenses, and that he was released from the most recent sentence more than two years ago, he would have six Criminal History points. See *id.* § 4A1.1. This would put him in Criminal History Category III. See *id.* ch. 5, pt. A (sentencing table).

¹⁰⁰*Id.* (sentencing table).

¹⁰¹See Bowman, *supra* note 8, at 747 ("The Guidelines can and should be made simpler, both in terms of use by legal professionals and their comprehensibility to nonprofessionals affected by the results they generate.").

¹⁰²The general federal bank robbery statute has a statutory maximum of twenty years. See 18 U.S.C. § 2113(a) (1998). Another five years would be added for carrying the gun, if the prosecution charged and convicted the defendant accordingly. See *id.* § 924(c).

¹⁰³Bowman, *supra* note 8, at 706.

¹⁰⁴As Professor Bowman says, "The workings of the guidelines are complicated, but at least they are visible." *Id.* at 707-08; see also *id.* at 720 (describing openness of guidelines system as one of its strengths).

¹⁰⁵"No person shall be . . . deprived of . . . liberty . . . without due process of law . . ." U.S. CONST. amend. V.

¹⁰⁶The most recent figure was 48,848, from fiscal year 1997. U.S. SENTENCING COMMISSION, *supra* note 63, at vii (1998).

¹⁰⁷The data is available through the Inter-University Consortium for Political and Social Research at the University of Michigan. For details, visit the Internet web site for the National Archive of Criminal Justice Data at <<http://www.ICPSR.umich.edu/NACJD/home.html>>.

¹⁰⁸See Dalzell, *supra* note 13, at 327-30.

¹⁰⁹U.S. SENTENCING COMMISSION, ANNUAL REPORT 1989 11 (1989).

¹¹⁰*Mistretta v. United States*, 488 U.S. 361 (1989).

¹¹¹See MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997).

¹¹²*Id.* at 19. The highest score, 3.6, was shared by drug possession and drug manufacture, import/export, and trafficking. The lowest score, 2.7, was shared by robbery and fraud.

¹¹³See Dalzell, *supra* note 13, at 333.

¹¹⁴*Id.* at 334.

